

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Kenneth L. Bozeman,

Complainant,

v.

Hertz Corporation,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER**

The above-entitled matter came on for hearing before Administrative Law Judge Allen E. Giles on October 9, 1996 at the Minnesota Office of Administrative Hearings, 1700 Washington Square, 100 Washington Avenue South, Minneapolis, Minnesota.

Douglas A. Hedin, Attorney at Law, Suite 812, 120 South Sixth Street, Minneapolis, Minnesota 55402, appeared on behalf of the Complainant.

Ellen G. Sampson and Valerie Blatnik-Sigel, Leonard, Street and Deinard, Suite 2300, 150 South Fifth Street, Minneapolis, Minnesota 55402, appeared on behalf of the Respondent Hertz Corporation.

The record closed on November 20, 1996, upon receipt of reply briefs.

NOTICE

This order is **not** a final decision in this case. A final decision incorporating both liability and damages will be issued in accordance with Minn. Stat. § 363.071, subd. 2 and 3, after a hearing, if requested, on the issue of other costs and fees.

STATEMENT OF ISSUES

Whether Hertz Corporation committed unfair discriminatory practices by denying Kenneth L. Bozeman full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of Hertz Corporation because of his race in violation of Minn. Stat. § 363.03, subd. 3(a)(1) (1994);

Whether Hertz Corporation committed unfair discriminatory practices by engaging in reprisal against Kenneth L. Bozeman because of his association with a person of a different race in violation of Minn. Stat. § 363.03, subd. 7 (1994).

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Complainant Kenneth Leon Bozeman is an African-American male. He resides at 8541 Brookway Circle, Anchorage, Alaska, with his wife, Deneen Loretta Bozeman, who is Caucasian. The Bozemans have two children, Kenton, approximately ten years old, and Jaylee Deneen, approximately three years old. At the time of events giving rise to this proceeding, Kenton was eight years old and Jaylee was a six-month-old infant. Tr. p. 19.

2. Respondent Hertz Corporation operates a business wherein it extends, offers or makes available to the general public automobiles for short-term rental. In 1994, Hertz Corporation rented automobiles at many locations in Minnesota including the Rochester, Minnesota airport.

3. The Bozemans planned a vacation for July 1994 to visit relatives who lived in Oakdale, Minnesota, a suburb of St. Paul. When speaking with a travel agent, the Bozemans learned of a Northwest Airlines promotional in which they could save a total of \$600 (\$200 per ticket) if they booked their flight to Rochester, Minnesota instead of the Minneapolis-St. Paul airport. In order to take advantage of this savings, the Bozemans planned for Kenneth and Kenton to fly to Rochester after the brief layover at the Minneapolis-St. Paul airport. At the Minneapolis-St. Paul airport, Deneen and Jaylee would meet up with relatives who would take them to their metro area destination.

4. The Bozemans explained to the travel agent their plans: that Deneen and Jaylee would get off at Minneapolis-St. Paul and that Kenneth and Kenton would travel on to Rochester, rent a vehicle there, and drive back to St. Paul. Tr. pp. 23-24; Petitioner's Ex. 1.

5. The travel agent was informed of Mr. Bozeman's plans for picking up the vehicle in Rochester. The travel agent was told that Mr. Bozeman would pick up the vehicle using his wife's Mastercard. The agent did not express any concern regarding this method of picking up the automobile in Rochester.

6. The Bozemans received an itinerary that indicated that an automobile was to be picked up at the Rochester airport from Hertz Rent-A-Car, identified the weekly rate for the automobile and identified the confirmation number of the reservation as being "892422C5BE10SI". Petitioner's Ex. 1.

7. The Bozemans boarded a plane in Anchorage, Alaska on July 14, 1994 at approximately 9:50 p.m. to begin their vacation to the Minneapolis-St. Paul area.

After an approximately eight-hour flight, the plane arrived at the Minneapolis-St. Paul airport at approximately 6:00 a.m. on the morning of July 15. Upon arrival at the Minneapolis-St. Paul airport, Deneen Bozeman and their infant daughter joined relatives who carried them to their destination in the Minneapolis-St. Paul area. After about a three-hour layover, Kenneth Bozeman and his son, Kenton, proceeded on a Northwest Airlines flight to Rochester, Minnesota.

8. The plane arrived in Rochester at approximately 10:00 in the morning of July 15. Mr. Bozeman and his son gathered up their luggage, including Jaylee's car seat and other infant accouterments, ten items of luggage.

9. They went to the Hertz Rent-A-Car counter at the Rochester airport. Mr. Bozeman and his son waited in line for their turn at the counter for Hertz Rent-A-Car. When the representative became available, Kenton stayed with the family's luggage while his father walked over to the counter, approximately ten feet away.

10. When Mr. Bozeman arrived at the counter, he informed the Hertz representative, Mary Breseden, that he had a reservation and confirmation for rental of a Hertz automobile. First, he told Ms. Breseden that he would be using his wife's credit card. Mr. Bozeman placed on the Hertz counter his wife's credit card, his travel itinerary, his Alaska driver's license and Petitioner's Exhibit 3, his wife's picture ID. Mary Breseden took the credit card, ran a credit card check, took the travel itinerary and Mr. Bozeman's driver's license. She asked Mr. Bozeman what kind of vehicle he wanted and started processing the request. After she completed the credit card check, she handed the credit card back to Mr. Bozeman. Mary Breseden performed some form of check on Mr. Bozeman's Alaska driver's license. She gave Mr. Bozeman his driver's license and handed him keys to a rental vehicle. He waited at the counter while the contract was being printed by the computer. While waiting for the contract to be printed out, the agent picked up Petitioner's Exhibit 3, Deneen Bozeman's picture ID. Upon observing Deneen Bozeman's picture ID, Mary Breseden said, "Sorry, I can't give you the car." T. 33, 33-45.

11. Kenneth Bozeman reminded the agent that upon arrival he had informed her that he would be using his wife's credit card. He asked her why it was not OK at this time to use her credit card. Mary Breseden responded that his wife, "the credit card holder," had to be present to sign the contract in order to release the vehicle. She asked him to return the car keys; he returned the car keys. T. 36-37

12. Mr. Bozeman went to a pay phone to call his wife in St. Paul. He told her that he was having a racial problem that was preventing him from getting the vehicle. He explained that the rental agent had accepted the credit card, accepted his driver's license, had given him the keys, but when she saw his wife's ID, she said she could not give him the car. T. 42. After he explained the problem to his wife, they discussed their options and decided that Deneen should call the Hertz rental agent.

13. Deneen Bozeman called Mary Breseden. Kenneth Bozeman stood at the Hertz counter listening to Mary Breseden speak to his wife. Deneen Bozeman proposed to go to the St. Paul office of Hertz and sign the paperwork and fax the document to the Rochester counter. Mary Breseden indicated that that would be unacceptable and refused to allow it. She insisted that Deneen Bozeman come and sign for release of the vehicle. T. 37-38.

14. Kenneth Bozeman stepped away from the counter, and called his wife again. They decided that the only way to resolve the problem would be for Deneen Bozeman to come to Rochester and sign a rental contract. Deneen Bozeman would have to leave her infant daughter in St. Paul and prevail upon her uncle to drive her to the airport in Rochester, Minnesota.

15. Kenneth Bozeman returned to the Hertz counter a third time. In an effort to persuade Mary Breseden that he and Deneen were married, he showed her a picture of him and Deneen Bozeman on their wedding day when both of them were dressed in their wedding clothes. This effort was also unsuccessful. T. 40-41.

16. Mary Breseden was courteous toward Mr. Bozeman up until the time she saw his wife's ID. After that, she was unhelpful, offered no explanations, responded to questions in a "short" manner and appeared to want to get rid of Mr. Bozeman. He asked her for an opportunity to speak to a supervisor or someone else who could be of assistance to him. She did not give him the name of anyone else who could help him. Tr. pp. 55-56.

17. At no time during the three trips to the Hertz counter did Mary Breseden tell Kenneth Bozeman that Hertz' policies prohibited her from renting the car to him. She did not ask him if he had other credit cards or other means of payment. She did not recommend that he try other auto rental agencies.

18. Deneen Bozeman's only transport to Rochester was through her uncle who had gone to work after transporting her earlier that morning. She prevailed upon him again for assistance to Rochester. Deneen Bozeman left her infant daughter with relatives and had her uncle drive her to the airport in Rochester, Minnesota. She arrived at the Rochester airport at about 2:00 in the afternoon. Deneen and Kenneth Bozeman both went to the Hertz counter and Deneen signed a rental agreement. The car was released to the Bozemens.

19. Kenneth Bozeman felt rejected, not treated fairly and denied because of the incident. The incident "scarred my mind as well as my family's mind for the rest of our lives". For Mr. Bozeman, the denial and the rejection would always be there and could not be erased. T. 55. His self-esteem was low and he "really hurt inside". T. 67. Some of the discussions that he had with the Hertz agent were overheard by other persons standing in line. Kenton, who was sitting near the Hertz rental counter, observed all of his father's efforts to obtain the rental car. Mr. Bozeman was

embarrassed and humiliated by the situation and believed that the matter also hurt his son, Kenton. Tr. p. 54-55.

20. Approximately six months later, in January of 1995, the Bozemans again attempted to reserve and pick up a Hertz rental car. This time the effort was made at the Anchorage International Airport in Anchorage, Alaska. Kenneth Bozeman made the reservations by phone using his wife's Mastercard. He told the rental agent that he would pick up the car. Mr. Bozeman went to the airport to pick up the vehicle, using his wife's Mastercard and her state identification. The rental agent released the vehicle to him and he signed the rental agreement without any problems. T. 49-50.

21. Hertz distributes to its counter personnel and to travel agents who make auto rental reservations its policies regarding "third-party rental". The policy applies when a person attempts to rent a vehicle using someone else's credit card. It provides as follows:

All credit cards and/or charge cards . . . may be used only by the person whose name is embossed on the front of the card; an individual such as a spouse, relative, friend, child, etc., may not rent with another person's credit card or charge card, even with a letter of authorization.

Defendant's Exhibits 1 and 2.

22. Hertz counter sales representatives and managers are instructed about the policy (third-party rental) during their initial two-week training course and during subsequent on-the-job training. Tr. p. 78. The purpose of the policy is to prevent fraud, to ensure that the person renting and paying for a vehicle is authorized to do so, and to ensure that the person renting and paying for a vehicle will ultimately be responsible for the vehicle. Tr. p. 77.

23. When Hertz refuses rental, Hertz counter sales representatives, including Mary Breseden, routinely ask a customer whether he has other forms of payment (i.e. other credit cards) and will recommend them to other auto rental agencies. T. 106 On July 15, 1994, Mary Breseden did not ask Kenneth Bozeman for other forms payment or recommend other auto rental agencies.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge has authority to consider the issues raised by Complainant's discrimination charges under Minn. Stat. §§ 363.071, subds. 1a and 2 and 14.50 (1994).

2. The Notice of and Order for Hearing was proper as to form, content and execution, and all other relevant substantive and procedural requirements of law or rule have been satisfied.

3. Respondent Hertz Corporation's rental car business is a "place of public accommodation" within the meaning of Minn. Stat. § 363.01, subd. 33 (1994).

4. Minn. Stat. § 363.03, subd. 3(a) prohibits a public accommodation such as Hertz Corporation from denying any person full and equal enjoyment of the goods and services it offers to the public because of race discrimination.

5. Complainant has the burden of proof to establish by a preponderance of the evidence that Respondent Hertz Corporation committed unfair discriminatory practices in violation of Minn. Stat. § 363.03, subd. 3(a) (1994).

6. Complainant Kenneth L. Bozeman established a prima facie case of race discrimination. The Respondent offered a legitimate nondiscriminatory reason for its actions. The Hertz Corporation's nondiscriminatory reasons for the conduct of Mary Breseden are mere pretext and/or constitute a post hoc justification for its counter representative's treatment of Complainant.

7. By refusing to provide full and equal access to its rental car services to Kenneth L. Bozeman, Hertz Corporation committed an unfair discriminatory practice in violation of Minn. Stat. § 363.03, subd. 3 on the basis of race discrimination.

8. Under Minn. Stat. § 363.03, subd. 7(2) (1994), it is an unfair discriminatory practice for any public accommodation to intentionally engage in any reprisal against any person because that person:

associated with a person or a group or persons who are disabled or who are of a different race, color, creed, religion, sexual orientation, or natural origin.

Because the Hertz counter representative's behavior toward Mr. Bozeman abruptly changed upon observation of his wife's photo identification, Hertz Corporation intentionally engaged in reprisal against Mr. Bozeman in violation of Minn. Stat. § 363.03, subd. 7(2).

9. Minn. Stat. § 363.071, subd. 2 (1994), permits an award of compensatory damages up to three times the amount of actual damages sustained by the victim of discrimination. As a victim of discrimination, Mr. Bozeman is entitled to compensatory damages. No compensatory damages have been alleged or proved; therefore, none will be awarded.

10. Under Minn. Stat. § 363.071, subd. 2 (1994), victims of discrimination are entitled to compensation for mental anguish and suffering from discriminatory

practices. In this case, Mr. Bozeman suffered mental anguish and suffering as a result of the discriminatory conduct of Hertz' counter representative and, therefore, is entitled to compensation for mental anguish and suffering he sustained in the amount of \$15,000.

11. Under Minn. Stat. § 363.071, subd. 2, the standards set forth in Minn. Stat. § 549.20 (1994), punitive damages may be awarded for discriminatory acts where there is clear and convincing evidence that the acts show a deliberate disregard for the rights or safety of others. In this case, Complainant is entitled to punitive damages in the amount of \$2,500.

12. Minn. Stat. § 363.071, subd. 2 requires the award of a civil penalty to the State when a public accommodation violates the provisions of the Human Rights Act. Taking into account the seriousness and extent of the violation, the public harm occasioned by it, the financial resources of the Respondent, and whether the violation was intentional, Respondent should pay a civil penalty to the State in the amount of \$50,000.

13. Minn. Stat. § 363.071 authorizes the Administrative Law Judge to order Respondent to pay Mr. Bozeman's reasonable attorney's fees. Attorney's fees will be awarded in this case upon submission of the fees and costs incurred by Complainant's attorney.

14. Minn. Stat. § 363.071, subd. 7 requires the award of litigation and hearing costs incurred by the Department of Human Rights unless payment of the costs would impose a financial hardship on Respondent. Upon consideration of Respondent's financial hardship, litigation and hearing costs will be awarded upon submission of costs incurred by the Department of Human Rights.

15. These Conclusions are made for the reasons set forth in the Memorandum which follows. The Memorandum is incorporated herein by reference.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED:

1. The effective date for this Order shall be the same date as the Order relating to attorney's fees and hearing and litigation costs to be issued after a hearing (if requested) on these issues.

2. If requested, a hearing on attorney's fees and costs is hereby scheduled for 2:00 p.m. on February 27, 1997, at the Office of Administrative Hearings, Suite 1700,

100 Washington Avenue South, Minneapolis, Minnesota at which time the Judge shall hear argument and consider Complainant's attorney's fees and costs.

3. By January 31, 1997, Complainant shall submit an attorney's fees petition sufficient to allow the Judge to make findings consistent with the legal principles developed in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). Respondent shall respond by February 20, 1997.

4. The Department of Human Rights shall identify its litigation and hearing costs. By January 31, 1997, Respondent shall show cause or present argument why an award of litigation and hearing costs would impose a financial hardship on Respondent. Complainant shall respond by February 20, 1997.

5. Respondent shall cease and desist from any further discrimination based on race while doing business within the State of Minnesota as a public accommodation.

6. Respondent shall pay Kenneth Bozeman \$15,000 as damages for mental anguish and suffering.

7. Respondent shall pay Kenneth Bozeman \$2,500 as punitive damages.

8. Respondent shall pay to the Minnesota State Treasurer \$50,000 for deposit in the General Fund of the State of Minnesota.

9. Respondent's motion for Summary Judgment is hereby denied.

10. Complainant's motion that Hertz be sanctioned for failure to comply with the pre-trial ruling excluding certain documents is denied.

Dated this _____ of January, 1997.

ALLEN E. GILES
Administrative Law Judge

Reported: Transcribed, Reporters Diversified Services, Duluth, Minnesota.

MEMORANDUM

This proceeding arises from an alleged violation of the Minnesota Human Rights Act. Minnesota Statutes, Chapter 363 (1994) (hereinafter also referred to as the

"MHRA" or "Human Rights Act") by a "place of public accommodation." Minn. Stat. § 363.01, subd. 33 defines "place of public accommodation" as follows:

Subd. 33. Place of public accommodation. "Place of public accommodation" means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.

The parties have not contested the question of whether Hertz Corporation qualifies as a "place of public accommodation." The Company apparently concedes that the auto rental services that it makes available to the public in the State of Minnesota qualifies as a "place of public accommodation. Therefore, the Judge has concluded that Hertz Corporation is a public accommodation within the meaning given to this term by Minn. Stat. § 363.01, subd. 33.

Minn. Stat. ' 363.03, subd. 3(a)(1) (1994) prohibits a public accommodation from denying any person full and equal enjoyment of the goods and services it offers to the public because of race discrimination. The provision provides as follows:

Subd. 3. Public accommodations. (a) It is an unfair discriminatory practice:

(1) to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin, marital status, sexual orientation, or sex, or for a taxicab company to discriminate in the access to, full utilization of, or benefit from service because of a person's disability;

The Human Rights Act also prohibits reprisals by a public accommodation against a person because of his association with a person of a different race. Minn. Stat. § 363.03, subd. 7. Subdivision 7 provides in relevant part as follows:

It is an unfair discriminatory practice for any . . . public accommodation . . . to intentionally engage in any reprisal against any person because that person:

. . .

(2) Associated with a person or group of persons who are disabled or who are of different race, color, creed, religion, sexual orientation, or national origin.

A reprisal includes, but is not limited to, any form of intimidation, retaliation, or harassment. It is a reprisal for an employer to do any

of the following with respect to an individual because that individual has engaged in activities listed in clause (1) or (2): refused to hire the individual; depart from any customary employment practice; transfer or assign the individual to a lesser position in terms of wages, hours, job classification, job security, or other employment status . . .

Mr. Bozeman filed a charge of discrimination with the Minnesota Human Rights Department on November 7, 1994. After the charge of discrimination was pending 180 days, he elected to pursue this action before the Office of Administrative Hearings. He claims that Hertz Corporation refused to rent a car to him because of his race and because of his association with his wife Deneen Bozeman who is Caucasian. Hertz Corporation, on the other hand, claims that it did not discriminate against Mr. Bozeman because of his race and that Mr. Bozeman was denied rental of the car pursuant to Hertz Corporation's third-party credit card policy.

Assessment of Testimony

- The Judge is persuaded by Kenneth Bozeman's description of the events that occurred at the Rochester airport Hertz counter on July 15, 1994. Based on the Judge's view of Kenneth Bozeman's demeanor and the spontaneous manner in which he answered questions, the Judge believes that his testimony is truthful and honest. Mr. Bozeman has lived in Alaska for approximately 18 years, having first traveled there in connection with his service with the Armed Forces. He has never appeared in a trial-type proceeding except for a divorce proceeding involving his former wife, Kenton's mother. The Judge finds his testimony and his description of the events that occurred that day as being credible.

Mr. Bozeman testified that he believed that Mary Breseden had a racial problem with him because the rental transaction was for the most part completed when she viewed his wife's picture ID and realized that she was Caucasian. He testified that the manner in which she treated him abruptly changed upon her observation of Deneen's identification card. She was "short" with him, and later with his wife. She did not offer explanations. Mr. Bozeman believed that Mary Breseden did not believe him that he, an African-American, was married to Deneen. As a result, he attempted to persuade her that he was married to Deneen Bozeman. One way of doing that was to use the wedding photo that he had in his pocket.

Mary Breseden testified that she had no recollection of the events occurring on the morning of July 15, 1994. She did not remember what she did or did not do on this day and had no recollection of any previous dealings with Kenneth Bozeman as a customer. Therefore, her testimony does not support Hertz' claim that she was enforcing Hertz' third-party credit policy.

On consideration of Mary Breseden's testimony, particularly the testimony that she does not recall dealing with Kenneth Bozeman, the Judge finds her testimony not credible. Mary Breseden testified that credit card-type problems occurred only rarely. She testified that credit card problems occurred approximately once a month. On the morning of July 15, Kenneth Bozeman went to the Hertz counter four times (three times by himself and one with his wife). On one of those occasions, he showed Mary Breseden a wedding picture. The Judge believes that it is unlikely that Mary Breseden would have forgotten the events occurring on July 15, given the number of times Kenneth Bozeman came to the counter, his presentation of a wedding picture, her discussions over the telephone with Deneen Bozeman while Kenneth Bozeman stood at the counter, and finally, both of the Bozemans appearing at the counter together to rent the automobile. Given the fact that Mary Breseden did not have credit card problems that often, and the extraordinary events that occurred on July 15, 1994, the Judge finds some difficulty believing that Ms. Breseden has no recollection of the Bozemans.

The Judge finds also that Ms. Breseden's testimony is particularly not credible in connection with the analysis of this case proposed by Hertz. Hertz claims without supporting record evidence (testimony from Mary Breseden) that Mary Breseden was herself embarrassed on the morning of July 15 because she had not discovered at an earlier time in the transaction that Mr. Bozeman's name was not the name embossed on the credit card. Hertz asserts that this was the reason that her manner in dealing with Mr. Bozeman changed. The Judge believes that if this were the case it would be even more likely that Mary Breseden would have recalled the transaction occurring on the morning of July 15.

Hertz claims contradictory testimony by Kenneth Bozeman relating to three items: 1) the length of the time for the drive from the Twin Cities to Rochester; 2) his wife's driver's license and 3) the time at which Hertz ultimately released the car to Deneen Bozeman. The Judge finds that these claimed contradictions are minor and do not affect Mr. Bozeman's credibility, even if they were true. However, a closer examination of the claimed contradictions suggests that Respondent's claims have no merit.

Mr. Bozeman testified that his wife arrived at the Rochester airport at approximately 2:00 p.m. When she arrived, both of them went to the Hertz counter. With Deneen Bozeman present, Hertz rented the vehicle. Hertz claims that the rental occurred at 12:22 p.m., the time printed on Petitioners' Exhibit 4. However, the Judge recalls that there was a suggestion that the document bearing 12:22 p.m. could have been printed at a time earlier than when the vehicle was picked up. T. 111-16.

With respect to the four-hour drive claim, the Judge notes that this record establishes that Kenneth Bozeman and his son Kenton both were at the Rochester airport approximately four hours. Mr. Bozeman contacted his wife shortly after arrival at about 10:00 a.m. It took Deneen Bozeman about four hours after the call to get to the Rochester airport.

Finally, Hertz claims a contradiction in Kenneth Bozeman's testimony regarding whether or not Deneen Bozeman was required to give her driver's license to Mary Breseden. Kenneth Bozeman testified that no license was given at the airport. Hertz, however, claims that a document had Deneen Bozeman's driver's license number. The Judge believes that Deneen Bozeman could have given the Hertz counter agent her driver's license while speaking to her over the phone, this also would account for Petitioner's Exhibit 4 having a time earlier than 2:00 p.m. The driver's license may have been given to the Counter Representative after Deneen Bozeman arrived at the Rochester airport. Regardless of how the driver's license was obtained, Kenneth Bozeman's recollection on this matter does not diminish the overall credibility of his testimony.

Application of Legal Standards

- In considering alleged violations of the MHRA, Minnesota courts have frequently borrowed from federal case law interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. ' 2000e, et seq. because of several similarities between the two statutes. For example, in analyzing whether a discriminatory employment action has occurred under the MHRA, Minnesota courts apply many of the principles articulated by the U. S. Supreme Court in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). See, e.g., Danz v. Jones, 263 N.W.2d 395, 399 (Minn. 1978). McDonnell-Douglas provides a method of evidentiary analysis for determining discriminatory motive when a record contains no direct evidence and a trial court must rely on circumstantial evidence. See Larson, Employment Discrimination, Ch. 8, p. 8-105 (2nd Edition).

The McDonnell-Douglas approach consists of a three-step analysis. The complainant is first required to establish a prima facie case. What actually constitutes the required prima facie showing may vary from case to case, depending on the kind of employment discrimination being alleged and the particular "factual pattern and employment context". Sigurdson v. Isanti County, 386 N.W.2d 715, 720 (Minn. 1986). Establishment by a complainant of the required prima facie case creates a presumption of employment discrimination prohibited by Minn. Stat. ' 363.03. Although the burden of proof always remains with the complainant, the burden of producing evidence then shifts to the respondent to present evidence of some legitimate, non-discriminatory reason for its actions. Id. If the respondent comes forward with evidence of a legitimate, nondiscriminatory reason for the employment actions in question, then, in order to prevail, the complainant must prove by a preponderance of the evidence that the reasons or justification advanced by the respondent amount to a pretext for intentional discrimination. Id.

A complainant may sustain the burden of proving discriminatory intent, as required by the third step of the McDonnell-Douglas test, either directly, by adducing direct evidence of a discriminatory motive, "or indirectly by showing that the employer's proffered explanation is unworthy of credence." Sigurdson, 386 N.W.2d at 720, quoting Burdine, 450 U.S. at 255-56. The sole question in the third step is "whether or not the

court is persuaded that the employee has been the victim of intentional discrimination.” Hasnudeen, supra, at 2, citing Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 626 (Minn. 1988).

There is no direct evidence in the record that the Respondent’s refusal to rent a vehicle to Complainant resulted from a discriminatory motive. For example, Mary Breseden did not say, “I cannot rent the vehicle to you because you are a black person”. Therefore, a discriminatory motive on the part of the Respondent, if any, must be inferable from the surrounding circumstances using the method of evidentiary analysis set out in McDonnell Douglas Corp. v. Green.

-

Refusal to Rent

Recognizing that the elements of a prima facie case of discrimination vary depending upon the circumstances and the type of discrimination alleged, the Judge believes that a prima facie case of race discrimination by a public accommodation may be established as follows:

1. Complainant is a member of a protected class;
2. Complainant applied for or requested the goods or services being extended to the general public by a public accommodation;
3. Complainant is denied access to or use of the goods or services of the public accommodation.

-

Applying these standards, the Judge concludes that Complainant established a prima facie case. As an African American, Kenneth Bozeman is a member of a protected class. He requested and obtained confirmation of the availability of a rental vehicle from Hertz Corporation. Hertz Corporation refused to rent an automobile to him.

Respondent has articulated a legitimate non-discriminatory reason for its refusal to rent the automobile to Complainant. Hertz states that the enforcement of its "third party rental" policy was the reason that Kenneth Bozeman was not rented an automobile. Upon consideration of the legitimate reason advanced by Respondent, the Judge believes that the articulated reason constitutes pretext for racial discrimination for the following reasons.

Hertz Corporation claims that Mary Breseden was enforcing the company's third-party credit card policy when she denied the auto rental to him. However, the record establishes that Mary Breseden had already scrutinized Deneen Bozeman's credit card and returned it to Mr. Bozeman. After she scrutinized Mr. Bozeman's driver's license and returned that to him; she gave him the keys to the car. The credit card issue did not arise until Mary Breseden scrutinized Deneen Bozeman's picture ID, Petitioner's Exhibit 3. Only after Ms. Breseden discovered that Deneen Bozeman was Caucasian did she enforce Hertz' third-party policy.

The Judge believes that had Mary Breseden informed Mr. Bozeman that she was enforcing Hertz third-party credit card policy, he would not have made the effort to pursue her that he was married to Deneen Bozeman. For example, she could have told him that it didn't matter whether he was married to Deneen Bozeman. Hertz' third-party rental policy requires the person whose name is embossed on the credit card to be present to rent the car. If she had told Mr. Bozeman this, he would not have returned to Hertz's counter three times trying to persuade her that he was married to Deneen Bozeman.

Kenneth Bozeman informed two different agents of Hertz Corporation that he would be using his wife's credit card to rent the vehicle. Neither of the agents expressed concern about using this method of payment. After Mary Breseden saw Petitioner's Exhibit 3, Mary Breseden was "short" with Kenneth Bozeman, did not ask him for other forms of payment and did not refer him to other rental car agencies. The Judge also believes that Mary Breseden's lack of recollection of the events occurring on July 15 is further evidence of pretext. Mr. Bozeman appeared at her counter four times, once with a wedding picture and finally with his wife. The Judge does not believe these events would have been forgotten.

Finally the Judge notes that three different persons (Mary Breseden, Travel Agent arranging the Bozemans' Minnesota trip, and the Hertz Counter Representative in Anchorage, Alaska) acting as agents of Hertz for reservation or rental of vehicles, all expressed no concern to Kenneth Bozeman when they were informed that he would be using Deneen Bozeman's credit card.

For these reasons the Judge concludes that the legitimate reason articulated by Respondent for refusal to rent the automobile to Complainant is pretextual. Based on the circumstances and particularly the testimony, it is reasonable to infer that the reason articulated by Respondent masked an underlying discriminatory intent. Hasnudeen, at 2. Therefore, Hertz Corporation committed an unfair discriminatory practice by refusing to rent a vehicle to him on the morning of July 15.

Reprisal

Complainant also argues that Respondent committed an unfair discriminatory practice by taking reprisal against him because of his association with Deneen Bozeman in violation of Minn. Stat. § 363.03, subd. 7. Subdivision 7 provides in relevant part as follows:

It is an unfair discriminatory practice for any . . . public accommodation . . . to intentionally engage in any reprisal against any person because that person:

- (2) Associated with a person or group of persons who are

disabled or who are of different race, color, creed, religion, sexual orientation, or national origin. opposed a practice forbidden under this chapter . . .

A reprisal includes, but is not limited to, any form of intimidation, retaliation, or harassment. It is a reprisal for an employer to do any of the following with respect to an individual because that individual has engaged in activities listed in clause (1) or (2): refused to hire the individual; depart from any customary employment practice; transfer or assign the individual to a lesser position in terms of wages, hours, job classification, job security, or other employment status . . .

The McDonnell Douglas burden-shifting scheme for analyzing discrimination claims applies to claims of reprisal or retaliation. Hubbard v. United Press Intern. Inc., 330 N.W.2d 428, 444 (Minn. 1983). Complainant has the initial burden of establishing a prima facie case of reprisal or retaliatory denial. To establish a prima facie case of retaliation, Complainant must establish:

- (1) statutorily-protected conduct by the complainant;
- (2) adverse action such as a denial or refusal of use or access to services offered by the public accommodation; and
- (3) a causal connection between the two.

Once the prima facie case is established, the burden of production shifts to Respondent to show some legitimate, nondiscriminatory reason for the adverse action or denial. If Respondent meets this burden, Complainant has the opportunity to show that Respondent's presumptively valid reasons are in fact a pretext for obscuring discrimination. Hubbard v. United Press Intern. Inc. at 444-45 and Giuliani v. Stuart Corp., 512 N.W.2d 589, 593-94.

The Judge concludes that Mr. Bozeman has established the prima facie case of reprisal. His association and marriage to Deneen Bozeman is "statutorily-protected conduct". He was denied rental of a vehicle when Mary Breseden connected him to Deneen Bozeman by visual inspection of Petitioner's Exhibit 3. Therefore, all the elements of a prima facie case of reprisal have been established.

Hertz Corporation's legitimate nondiscriminatory reason for the denial of the rental to Mr. Bozeman was that Mary Breseden was enforcing the third-party rental policy. For the reasons previously discussed above, the Judge believes that the articulated reason, enforcement of the third-party credit card policy, is pretextual. The Judge, therefore, concludes that Respondent has committed an unfair discriminatory practice in violation of Minn. Stat. § 363.03, subd. 7.

Summary Judgment

Hertz Corporation filed a summary judgment motion that was not submitted or fully briefed until two or three days before the trial. The Judge informed the parties by letter that the summary judgment motion would be denied. Because of the disputed factual issues, the case was inappropriate for summary judgment. The summary judgment motion was submitted so close to the date of the hearing that the Judge did not issue a formal written order denying the summary judgment. A formal denial of the motion is contained in this Report.

Hertz' Failure to Comply with the Pretrial Order

A Pretrial Order issued in this case required that the parties disclose witnesses and documentary evidence that the parties intended to submit at trial. Hertz Corporation made no submission of names of witnesses or documentary evidence it intended to present at trial. Approximately two business days before the hearing, Hertz identified several witnesses and several documents that it desired to be considered as evidence in the proceeding.

Complainant opposed Hertz calling any witnesses or introducing any documentary evidence because the Company failed to comply with the Pretrial Order requiring the Hertz to identify documents and witnesses approximately a month before the trial. Mr. Bozeman also opposed a continuance. Finally, Complainant requested that the Judge strike portions of Hertz' Post-trial memorandum because it contained references to excluded documents.

The Judge determined that it was inappropriate to force Hertz Corporation to proceed to trial without witnesses. The Judge, therefore, allowed testimony from John Cherry who was Director and supervisor of the Hertz business operations in the Minneapolis-St. Paul metropolitan area. Not only was Mr. Cherry responsible for Hertz' metropolitan operations, he also was the person that Hertz counter service representatives would contact regarding operation of Hertz' policies. The Judge also allowed the testimony of Mary Breseden, the Hertz counter representative who dealt with Mr. Bozeman. Hertz also had supplied Mr. Bozeman documents in discovery that contained Hertz' third-party credit card policy. These documents were allowed also by the Judge.

The Judge finds that Hertz' reference to excluded documents is inappropriate but also recognizes that the Judge did allow brief testimony on this matter. Hertz' reference does not appear to exceed the testimony allowed. Therefore, Complainant's motion that Hertz be sanctioned for failure to comply with the pre-trial ruling excluding certain documents will be denied.

Mental Anguish and Suffering

Minn. Stat. § 363.071, subd. 2 authorizes the Administrative Law Judge to award damages for mental anguish and suffering. Upon consideration, the Judge believes that \$15,000 is the appropriate compensation for Kenneth Bozeman's mental anguish and suffering.

Complainant suffered mental anguish as a result of the treatment received from Mary Breseden. Mr. Bozeman showed up at the Rochester airport with a confirmation number for rental of an automobile, the Bozemans had informed the travel agent of the manner in which they intended to handle the rental and Mr. Bozeman informed Hertz' counter representative, Mary Breseden, at the beginning of the transaction that he would be using his wife's credit card. Thus, on two different occasions, agents of Respondent had been informed that he intended to use his wife's credit card. Yet, Mary Breseden asked him to return the keys to the automobile after she saw Deneen Bozeman's photo. Under the circumstances, it is not unreasonable for him to feel unfairly treated and rejected.

An award of damages for mental anguish in cases arising under the Human Rights Act may be based on subjective testimony. The court stated that "recoverable pain and suffering does not have to be severe or accompanied by physical injury. Gillson v. State Department of Natural Resources, 492 N.W.2d 835, 842 (Minn. Ct. App. 1992). In Gillson, the Court of Appeals upheld a trial court's award of \$100,000 for damages for mental anguish and suffering.

Kenneth Bozeman felt low self-esteem, for him the four-hour ordeal was a "scar on my mind" and "my family's mind" for the rest of our lives." He was embarrassed and humiliated by the treatment from Mary Breseden, other persons at the airport overheard portions of the discussion, and his son Kenton also observed the treatment Mr. Bozeman received. Finally, in an unsuccessful and humiliating effort to persuade the Hertz Representative that he was married to Deneen Bozeman he showed her their wedding day picture.

Based on Complainant's subjective testimony, it is appropriate to award \$15,000 as damages for mental anguish and suffering.

Civil Penalty

Minn. Stat. § 363.071, subd. 2 requires that the Administrative Law Judge assess a civil penalty against a respondent who has committed unfair discriminatory practices. That provision provides, in part, as follows:

The Administrative Law Judge shall order any respondent found to be in violation of any provision of section 363.073 to pay a civil penalty to the state. This penalty is in addition to compensatory

and punitive damages to be paid to an aggrieved party. The Administrative Law Judge shall determine the amount of the civil penalty to be paid, taking into account the seriousness and extent of the violation, the public harm occasioned by the violation, whether the violation was intentional, and the financial resources of the respondent. Any penalties imposed under this provision shall be paid into the general fund of the state.

The Judge believes that a civil penalty of \$50,000 is appropriate in this case. In setting this penalty, the Judge has considered several factors. First, there are a series of suggestions that Hertz has not taken the complaint of race discrimination seriously or has not acted as a reasonable, serious person would in handling this complaint of race discrimination. For example, it does not appear that Hertz ever investigated the complaint, i.e., no one talked to Mary Breseden. A company that takes a complaint such as this seriously would at least have investigated the matter by speaking with Mary Breseden to ascertain whether she needed additional training and consider her racial views. Instead, she has continued to work for Hertz, free to continue to express her racial views in the conduct of Hertz's business.

Although Mary Breseden continues to work as a counter representative for a Hertz agency at the Rochester airport, Hertz failed to identify her as the counter representative involved in this case until approximately two business days before the trial in this case.

The Judge is required to consider the financial resources of the respondent. Hertz is a large nationwide corporation. Except for a few weeks before the trial, the Company appears to have been inattentive to this matter. Based on this record, it appears that the Company has not taken this matter seriously. The Judge believes that the amount of this civil penalty is necessary to impress upon Respondent that civil rights complaints require the Company's attention. Finally, by the amount of this civil penalty, Hertz is informed that the State of Minnesota takes seriously the prohibition against race discrimination in the conduct of its rental car business.

The Judge believes that Hertz' response to the complaint, particularly its failure to investigate, has been reckless and inconsistent with the actions of a reasonable person concerned with complying with the Human Rights Act. The size and the nature of the civil penalty is in the Judge's discretion. The Judge notes that in the Bradley v. Hubbard Broadcasting, et al., 471 N.W.2d 670 (Minn. App. 1991), a \$200,000 civil penalty was awarded against the defendant in that case. After consideration of all the above, the Judge has determined that a civil penalty of \$50,000 is appropriate in this case.

Punitive Damages

Minn. Stat. § 363.071, subd. 2 authorizes the Administrative Law Judge to award punitive damages to a victim of unfair discriminatory practices. The Judge is required to consider factors set out in Minn. Stat. § 549.20. Section 549.20, subd. 1 authorizes an award for punitive damages when there is “clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.”.

Minn. Stat. § 549.20, subd. 3 provides as follows:

Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

Applying the standards from above, the Judge believes that the attitude and conduct of Hertz Corporation as manifest in its failure to investigate shows a deliberate disregard for the protected civil rights of Kenneth Bozeman. Hertz' attitude of disregard is further demonstrated by the Company's failure to identify Mary Breseden until a few days before the hearing. Based on the foregoing, the Judge concludes that Hertz Corporation acted in deliberate disregard for the rights of Kenneth Bozeman and that an award of \$2,500 as punitive damages is appropriate in this case.

Litigation and Hearing Costs

Minn. Stat. § 363.071, subd. 7 requires that the Administrative Law Judge order a respondent who has engaged in unfair discriminatory practices to reimburse the Minnesota Department of Human Rights for “all appropriate litigation and hearing costs expended.” The Judge has directed the Department of Human Rights to supply an accounting of the litigation and hearing costs incurred by the Department in connection with this proceeding. Appropriate litigation and hearing costs will be awarded by the Judge subject to the financial hardship imposed upon Respondent.

Attorney's Fees

Minn. Stat. § 363.071, subd. 2 authorizes the Administrative Law Judge to make an award of attorney's fees. The Judge has directed counsel for Complainant to provide an accounting of attorney's fees and costs. In a subsequent order, the Judge will award appropriate and reasonable attorney's fees and costs.